The contingent workforce
Are you aware of the traps to avoid?
Presenters

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Agenda

► Business context: the use of alternative/contingent workforces

► Key issues in intragroup workforces

► Key issues in external workforces

► Case studies
Business context: the evolving use of alternative/contingent workforces
Challenge: evolving use of internal and external workforces

► In today’s ODE (on-demand economy), businesses are now resorting to the use of diverse workforce models across the supply chain.

► Companies are relying more and more not only on their own workforce to get the job done, but also on the external or contingent workforce.

► The increasing use of a contingent workforce (often with limited involvement of HR) raises complex HR labor law (and even tax) issues and may expose companies to financial, criminal and reputational risk.

► HR does not necessarily have a good grasp of the issues/risks relating to the contingent workforce.

► Today most businesses have not yet implemented policies/processes to ensure compliance with contingent workforce regulations.

► Awareness of these risks is key to helping ensure that the appropriate compliance tools are put in place in order to avoid unexpected liabilities and costs.
Strategic workforce management: buy, build or outsource

- **Buy**
  - Acquire a **new** workforce
  - How to deal with the new workforce?
    - Post/pre-merger integration
    - Corporate transformation
    - In the same country?
    - In different countries?
    - Matrix organizations?
    - Global employment organization?
    - Mobility?
    - Other?

- **Build**
  - Use your **internal** workforce
  - Where?
  - How?
    - Identifying the potential HR/legal/tax risks
    - Freelancers?
    - Independent contractors?
    - Other?
    - Subcontractors?
    - Franchisees?
    - Temporary agency workers?
    - Co-employment
    - Data privacy
    - Transfer of undertaking directive (TUPE)
    - Undeclared work
    - Social security
    - Payroll
    - Pension
    - Permanent establishment
    - Business travelers
    - Transfer pricing

- **Outsource**
  - Use an **external** workforce
  - Non-employees?
  - Employees of “others”?
Alternative workforce solutions

External workforce

- Outsourcing
- Sedentary employees
- Mobile employees
- Loan of personnel
- Matrix organization
- GEO* talent hubs/SSC**
- Contingent workers
- Freelancers
- Temps
- Service providers

Internal workforce

*GEO - global employer organization
**SSC - shared service center
Internal or external workforce, that is the question

Benefits of using an external workforce:

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<tr>
<th>Benefit</th>
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<tr>
<td>Key talent on an as-needed basis</td>
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<td>Less management time on performance evaluations/salary discussions</td>
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<td>No social security contributions</td>
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<td>No employee protection laws</td>
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<td>No protection against dismissal</td>
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<td>No continued remuneration</td>
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<td>Use of his own working equipment</td>
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<td>Reduced impact on works council issues</td>
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<td>Decreased direct and non-wage labor costs</td>
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<td>Business continuity while reducing employee headcount/fixed HR costs</td>
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<td>Increased flexibility and competitiveness</td>
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Key issues: intragroup workforces
Challenge: localization of business activities in a global environment – substance, key functions and people

The right person in the right place with the right skills

HQ, Switzerland

- USA
  - Finance (budget setting)

- China
  - Manufacturing

- Netherlands
  - Technical (project manager)
  - IT and global talent hub

- France
  - R&D communications/marketing

- India
  - R&D
  - Communications/marketing
  - Technical (project manager)

- Poland
  - HR and administrative/back office

- Reporting lines?
- Co-employment?
- BEPS?

*BEPS – base erosion profit sharing
Who is the “employer” in global organizations?

The responsible party is the one who:

- Procures and makes decisions?
- Gives orders and instructions?
- Controls work performance?
- Deals with HR issues?

Disconnect between the HR/operational organization and the legal entity structures

- The legal entity employing the workforce?
- The legal entity using the employee?
- Double reporting lines?
Challenge: managing increased risk of internationalization of employment disputes
Key issues: external workforces
Key HR-related issues with external workforces …

- Civil and criminal liabilities
- Severance costs (including all employment rights, such as paid holidays, pension rights …)
- Works council issues
- Employment status (therefore loss of all the benefits from non-employee status)
- Illegal leasing of employees and criminal offense of subcontracting of employees
- Social security contribution (employer and employee)
- Applicable employment law

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... but not only HR-related issues ...

- Data privacy
- IP Rights for the group
- Permanent establishment
- BEPS
- Loss of confidentiality, disclosure of trade secrets
- Unfair competition/non-compete obligations
- Third-party liability, null and void decision/act
- Bribery
- Damage to reputation
- Loss of confidentiality, disclosure of trade secrets
Buy, build or outsource – solutions and checklist

**Internal workforce solutions**

1. Have the right person at the right place to align substance/assets and function
2. Ensure employment documentation squarely matches tax documentation
3. Avoid co-employment risk, which could compromise the efficiency model
4. Ensure compliance with works council consultations and labor laws in general

**External workforce solutions**

1. Establish an external business partner policy
2. Establish clear rules and guidelines around outsourcing, taking international norms into account
3. Monitor compliance by regular audits of business partners
4. Never instruct the employees of business partners directly
5. Involve HR/legal from the start
Case studies
Case study: intragroup employees

The challenge
Running the group efficiently across the globe through matrix organization model while taking into account IP rights apportionment across the legal entities of the group

What we did
► Alerted the client of risks relating to co-employer liability
► Awareness of different types of claims and risks abroad (US)
► Defense of litigation brought in New Jersey federal court under the Conscientious Employee Protection Act
► Managed issues relating to discovery in international context

Result
► Litigation pending
► Expensive to defend the case (over US$1M estimated to trial)
► Lessons learned
► New approach to minimize HR legal risk
► Loss of valuable time of executives needed to defend the case
# Case study: external workforce audit

## The challenge
The client is one of the largest telecom companies in Germany. It required assistance for undertaking a legal review of all relationships with external service providers and supplier of external workforces as well as the respective procurement processes in order to evaluate compliance with employment, tax and social security law.

## What we did
- Conducted interview with process owners to obtain process understanding
- Implemented an interim procedure to review all existing relationships with external service providers and winding up of unlawful relationships
- Developed an evaluation, risk map and interview guide to conduct the analysis
- Involved in interim procurement procedure for external service providers and development of a future procurement operation model

## Result
- Resolution of unlawful relationships with external service providers and reduction of compliance risks
- Liability exemption for the board members regarding compliance issues
- Organizational change by the interim procedure to obtain legal compliance
- Implementation of a new procurement operating model to assure procedures in line with legal requirements
- Development of an automated tool to support the legal assessment of the relationships with external service providers as part of the new procurement operating model
Questions